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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October TERM, 1982

CHASE FOUNDRY & MANUFACTURING CO.,

Petitioners

v.

STATE OF OHIO,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

1. A statute, as construed, that provides for the issuance of an injunction, the effect of which is to force a company out of business, irrespective of the circumstances involved or the past interactions between the OEPA and the company, violates the company's right to due process of law.

2. A statute, as construed, that subverts the judiciary into a ministerial agent for the OEPA, by requiring that the court issue an injunction when requested by the OEPA, violates the principle of separation of powers between co-equal branches of government.

PARTIES

Petitioner is Chase Foundry & Manufacturing Co. Respondent is the State of Ohio.

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered in the above case wherein said Court's jurisdiction was refused with respect to Petitioners' appeal of the Decision of

the Franklin County, Ohio Court of Appeals, entered on March 2, 1983 and to review the said November 16, 1982 Decision of the lower appellate court.

OPINIONS BELOW

Petitioners' motion to certify the record was dismissed by the Ohio Supreme Court without public report. The November 16, 1982 Decision of the Court of Appeals of Franklin County, Ohio, which was left standing by the Ohio Supreme Court's refusal to extend jurisdiction over this matter has not as yet been and may not be publicly reported. The pertinent Decisions and Entries are included with the Appendix to this Petition.

JURISDICTION

The Ohio Supreme Court's sua sponte refusal to grant jurisdiction over Petitioners' appeal was entered herein on March 2, 1983 and this petition for a writ of certiorari was filed within ninety (90) days following entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §2101(c) and Rule 17.1(b), (c), United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Fourteenth Amendment to the United State Constitution. " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

B. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

C. "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was commenced by the Ohio Attorney General on behalf of the Ohio Environmental Protection Agency ("OEPA") on August 7, 1978 to enjoin the operation of Chase Foundry's plant. The Complaint seeking the injunction was filed in six "counts", the first three alleging that Chase Foundry had failed or refused to comply with certain Findings and Orders issued by the Director of the OEPA on August 7, 1978 in failing to install required pollution control equipment or an electric induction furnace, and in that regard in failing to meet achievement deadlines set forth therein and to submit progress reports of the fact of such achievement. Counts Four through Six were alleged without reference to the aforementioned findings and orders, Five and Six averring that

Chase Foundry was emitting particulate matter and visible air contaminants, respectively. Count Six alleged that Chase Foundry was operating as a source of air contaminants without a permit to operate. The Court was asked to enjoin further operation until a permit to operate was obtained. The availability or status of a variance was not mentioned in the Complaint as a permissible form of license, although the Ohio Revised Code specifically provides for such an operating mechanism and virtually no manufacturer in Ohio operates under a permit, as opposed to a variance -- and even though Chase Foundry had previously operated under a variance, not a permit. Neither a temporary restraining order nor preliminary injunction was sought by the OEPA in the complaint or by motion.

After a substantial period of discovery the matter came before the trial court on cross-motions for summary judgment, pursuant to Rule 56, Ohio Rules of Civil Procedure. The court denied the OEPA's motion, finding as to the first three counts based on issuance of the Findings and Orders that they had been invalidly issued and were void, ab initio, pursuant to the pertinent statute. The court also found by implication that the OEPA had presented insufficient evidence in response to the motion on Counts Four and Five to avoid adverse judgment or justify issuance of an injunction under its own Cross-Motion, and further refused to enjoin the Company's operations on the basis of Count Six (absence of permit) under the circumstances of this case (the Common Pleas Court's Decision is annexed hereto as "Appendix A").

On appeal by the OEPA, the Franklin County Court of Appeals ruled that by the time of its decision the matter of the validity of the Findings and Orders had become moot, the effective period covered thereby having expired. It remanded Counts Five and Six to the trial court for further evidenciary proceedings, apparently disregarding the rule that the respondent had the burden of setting forth sufficient evidence to avoid summary judgment in making a response to a Rule 56 motion -- which the OEPA had failed to do. As to Count Six, however, the Court altogether reversed the trial court, holding that the absence of a permit to operate dictated that an injunction issue (the Court of Appeals Decision is annexed hereto as "Appendix B"). The fact that Chase Foundry had been operating under the authority of the

improper Findings and Orders was not even mentioned by the appellate court, and that court specifically held that evidence that it had attempted to file a variance application during the litigation was irrelevant to the case.

Chase Foundry operates a small grey iron foundry at 2300 Parsons Avenue, Columbus, Ohio. As a part of its industrial process, Chase Foundry melts scrap iron, recycling the iron into new castings. In producing these castings, the Company's employees spend approximately 6 to 6-1/2 hours per work day preparing sand molds for castings and approximately 1 to 1-1/2 hours actually melting scrap iron and pouring the molten iron into the molds, generally four days per week, but often only three days a week.

To melt the scrap iron, Chase Foundry owns and operates a small cupola, also known as a blast furnace, with a melting capacity of approximately 5 tons per hour (as rated by the manufacturer). The cupola is operated by Chase Foundry at a maximum melting rate of approximately 4 tons per hour.

During calendar year 1974, Chase Foundry was issued a variance by the OEPA whereby it was permitted to operate its cupola without control equipment in place, provided that a compliance schedule, attached to the variance, was met. That compliance schedule required the installation of emissions control equipment on Chase Foundry's cupola.

In response to that variance and compliance schedule Chase Foundry embarked on an investigation of the technology and equipment then available.

As a result the conclusion was reached that the most efficient control equipment which Chase Foundry could possibly afford was a "Water Curtain Cupola Collector," a type of control equipment commonly referred to as a "wet cap". Chase Foundry then decided to purchase such a system to satisfy the OEPA and, by letter of Mr. Paul Smith, President, of November 22, 1974, so notified the OEPA. The total costs and expenses involved in that purchase could well have exceeded One Hundred Thousand dollars ($100,000) at that time, a most substantial commitment for a company the size and financial condition of Chase Foundry. The OEPA's response was delivered to Chase Foundry in a letter dated December 10, 1974, and more forcefully in a telephone call of March 6, 1975. Both responses reflected the OEPA's opinion that, if Chase Foundry

were to install a wet cap on its cupola, the OEPA would require that the system perform satisfactorily during a "stack test." Both responses also reflected the OEPA's further opinion that the wet cap would not be able to pass such a test and would therefore not be issued a variance or permit to operate. In both communications, the OEPA clearly conveyed to Chase Foundry that if the stack test were not successfully completed, Chase Foundry would not be permitted to operate its cupola and that a variance permitting the "partially" effective equipment to operate would not be issued, notwithstanding the installation and expenditure of funds.

In the telephone conversation between Robert Carey and Paul Smith, mentioned above, however, Mr. Carey advised Chase Foundry to disregard the remaining

"milestones" of the 1974 variance, except the requirement that Chase Foundry provide the OEPA with progress reports. As to these reporting requirements, Mr. Carey advised Chase Foundry to submit "working at it" reports. Mr. Carey also indicated that the Company should await either the development of less expensive but more effective technology or the loosening of regulations as they applied to small foundries.

Many months later, on September 14, 1977, by letter from the Director of the OEPA, Mr. Smith was advised of the OEPA's opinion that Chase Foundry was violating Ohio's air pollution control regulations. Mr. Williams' letter went on to state that, despite Chase Foundry's expression of willingness to purchase a wet cap collector, discouraged by the OEPA, Chase Foundry had "so far,

completely failed to make more than the most meager attempts to comply with Ohio air pollution control regulations ... ," and advised Mr. Smith that Chase Foundry faced a $10,000 per day fine for failing to comply with the Director's demands.

In response to this letter, Mr. Smith wrote to then-Governor, James A. Rhodes, informing him of the OEPA's threats, of the competitive pressures facing Chase Foundry, and of the potentially disastrous effect on Chase Foundry's existence. The Governor responded by inviting Mr. Smith to meet with him and with OEPA Director in an attempt to resolve the problems facing the parties.

Mr. Smith subsequently attended a meeting at the Governor's office and explained to the Governor, the Director, and other OEPA officials that the Foundry's cupola was, on a relative

basis, very small and was operated only during a short period of time every day, at the most four days a week, that Chase Foundry did not enjoy the strong financial condition that would be required if the company were to make the investment demanded by the OEPA and still retain the ability to withstand adverse economic and operating situations. He also asserted that such an investment was not justified by Chase Foundry's limited operation of the cupola, even if it could be handled financially.

Governor Rhodes greeted Mr. Smith's statements with apparent understanding and responded by instructing the Director to meet with Mr. Smith again and to take some type of action to relieve the burden faced by the Company.

Following the Governor's instructions, the Director delegated his

duty to meet with Mr. Smith to a deupty, Mr. Jack Wunderle. Mr. Wunderle met with Mr. Smith on October 14, 1978, approximately one week prior to Mr. Wunderle's retirement from the OEPA. This meeting was not productive, because of Mr. Wunderle's imminent retirement. However, Mr. Wunderle did indicate to Mr. Smith that the OEPA knew that compliance with the agency's regulations imposed a substantial financial hardship on small foundries and that he would like to see something done to relieve the burden but despaired of any short-term progress in that direction.

After repeated requests, and at Mr. Smith's insistence, a meeting was then arranged between Mr. Smith and other representatives of Chase Foundry, and Director Williams, Mr. James Orlemann, and other OEPA representatives. At this

meeting, Mr. Smith stated that the Director appeared to be ignoring available statutory authority for providing Chase Foundry some relief from OEPA regulations, and again stated that Chase Foundry could not possibly afford to make an investment of the size insisted upon by the OEPA. Mr. Smith invited the Director to examine the company's financial reports and to determine for himself that Mr. Smith was being truthful. The essence of Mr. Williams' response was that finances were irrelevant and that Chase Foundry would have to install adequate control equipment or shut its operation down. The Director indicated that he had no discretion in the matter, "because it was all caused by the Feds."

This meeting concluded with the Director's statement that Chase Foundry's

"case" was to be referred to the Attorney General's office for prosecution of an injunction unless the company would meet with the OEPA's staff and agree on steps, satisfactory to the OEPA, that Chase Foundry would take.

Mr. Smith was so discouraged by the Director's position that the decision was made to meet with OEPA staff members in an attempt to find some way of avoiding the threatened shutdown. Mr. Smith eventually met with Mr. James Orlemann who reiterated the Director's position about the irrelevancy of financial matters and who even went so far as to tell Mr. Smith that if Chase Foundry was experiencing financial difficulties, it was solely "due to poor management."

In the meetings with Mr. Orlemann, Mr. Smith was advised to consider melting scrap with an electric induction

furnace. Mr. Orlemann offered electric melting as an alternative to the cupola as modified with control equipment. Insofar as Mr. Smith was uninformed about electric melting, and because Mr. Orlemann seemed to harbor some enthusiasm for that process, Mr. Smith agreed to investigate the possibility.

Mr. Orlemann then arranged for the drafting of proposed Findings and Orders, one set of the orders pertaining to the installation of an electric induction furnace and one pertaining to a high-energy scrubber. Attached to these Findings and Orders was a written Waiver reciting that Chase Foundry waived administrative and judicial review of the findings and orders permitted by statute, to which Mr. Smith objected. Mr. Orlemann responded that the Waiver was <u>standard</u> with all Orders, that Chase

Foundry had to sign the Waiver if the Orders were to issue, and if the Orders did not issue the entire matter would be referred to the Attorney General for suit. No stack tests had been conducted by the OEPA to actually measure the Company's emissions.

On or about May 24, 1978, the final version of the Orders was delivered to Mr. Smith along with a letter demanding that he sign the Waiver. Mr. Smith then signed the Waiver and returned the Orders to the OEPA. Mr. Smith still strongly objected to the necessity for the Waiver, however, and covered the executed Waiver with a letter saying so. At no time during these events was Chase Foundry represented by legal counsel.

Mr. Smith immediately began his own investigation of the control technology available in 1978, and into the alleged

alternative of induction furnaces. It became readily apparent that compliance with the Orders would be financially impossible.

Induction furnaces with capacities of more than one ton per hour were, even at that time, far beyond Chase Foundry's financial reach due to their extremely high purchase price -- particularly induction furnaces with the capacity to melt approximately one when necessary production and structural change factors were considered.

Specifically, with the lower melting rate the electric furnace would have to be operated roughly six hours a day, generating intense heat throughout the day. Presently, with the cupola melting only a short period of time, the operation is referred to as a "batch" process. The workers are able to make

molds for castings for the major portion of the work day and are exposed to heat from molten iron for only a short period of time.

With a continuous melting process, and the present physical plant, the workers would be exposed to the heat from the furnace and to the more than 1300 degree heat from the molten iron all day long in a small, closed quarter. To modify Chase Foundry's old physical plant to segregate the molders from the furnace and the poured molten iron would require extensive structural revisions, the cost of which, when added to the purchase price of the smaller furnace, would then have exceeded $300,000 and could likely have approached $500,000.00. By comparison, the total book value of the entire foundry physical plant was approximately $220,000. Its stock had no

ready market value, being a close corporation.

Another problem facing Chase Foundry with regard to the purchase of either control equipment or an electric furnace was that, in addition to the large initial investment for either type of equipment, both types would entail a substantial increase in operating expense over the Company's present operation.

Chase Foundry's income (before taxes) from operations for fiscal years 1976 through 1982 was as follows:

1976	$ 22,167.00
1977	8,949.00
1978	140,693.00
1979	102,431.00
1980	(40,551.00)
1981	20,857.00
1982	(120,426.00)

For the reasons above described, Chase Foundry discovered that it absolutely could not meet the

requirements imposed by the OEPA's Findings and Orders and so informed the OEPA. As a result, the OEPA brought the instant action in order to close down Chase Foundry's plant, as described above.

In its summary judgment motion, granted by the trial court, Chase Foundry presented evidence to the trial court demonstrating that the Findings and Orders had not been issued by the OEPA in compliance with the statutory requirements of Section 3704.03(S) which mandated, inter alia, that the Company's financial condition be taken into account by the Director of the OEPA in considering variances and ordering compliance with proposed orders. Further, Chase Foundry presented evidence concerning why it technically had no permit or variance (even

though a variance had been applied for by Chase Foundry and returned by the OEPA as if not filed during the period following the filing of OEPA's Complaint).

Chase Foundry attempted to appeal the above-described Decision of the Court of Appeals to the Ohio Supreme Court. Chase Foundry contended, inter alia, that the Decision of the appellate court constituted a denial of the Company's due process of law.

On March 2, 1983, the Supreme Court of Ohio refused to extend jurisdiction over Chase Foundry's appeal, dismissing the appeal without opinion sua sponte.

REASONS THE WRIT SHOULD BE GRANTED

Chase Foundry does not now have a permit or variance from the OEPA. The Franklin County Court of Appeals held that upon this fact alone Chase Foundry must be enjoined from operation of its plant pursuant to Ohio Revised Code Section 3704.06, which requires such a permit or variance for operation. The Court of Appeals held that the trial court had no power to consider the circumstances concerning why Chase Foundry did not have a permit or variance in determining whether an injunction was appropriate. The Court of Appeals felt constrained by ORC 3704.06 to issue an injunction because of the lack of the permit or variance. Such interpretation of ORC 3704.06 by the Court of Appeals in the context of the case at bar not only violates Petitioners' guranteed right to

due process but, in addition, unconstitutionally subverts the court from a co-equal branch of government to a ministerial agent for the OEPA.

In 1974 Chase Foundry was operating its cupola under a variance granted by the OEPA. After this variance expired Chase Foundry was informed by the OEPA that the only alternative to closing down its plant was to agree to Findings and Orders prepared by the OEPA. Faced with these alternatives as earlier detailed, the Company acquiesced to Findings and Orders and to a Waiver also required by the OEPA, such Findings having been issued without measurement of the actual rate of emissions at Chase Foundry or of the total emission level.

The trial court found that the OEPA had wrongfully ignored the statutory requirements of §3704.03(S) in issuing

the Findings and Orders, particularly as to financial impact upon the defendant. This express finding was not disturbed by the Franklin County Court of Appeals.

After Chase Foundry found that it could not comply with the unlawfully issued Findings and Orders, the OEPA brought the instant action not only to enforce the Orders but also to enjoin the continued operation of Chase Foundry's plant because Chase Foundry did not have a permit to operate or variance. The primary reason Chase Foundry did not have a permit or variance was, of course, because it had been operating under the Findings and Orders subsequently found to be invalid.

The OEPA brought the instant action, in part, to obtain an injunction pursuant to Ohio Revised Code §3704.06. At the time this action was filed §3704.06 provided in part as follows:

> The court shall have jurisdiction to grant injunctive relief or enter such other judgment, and orders enforcing such judgment, as the public interest and equities of the case require.

The "violations" of regulations claimed by the OEPA to have occurred all stem from the operation of Chase Foundry's cupola. Specifically, the OEPA alleges that the cupola operated by Chase Foundry emits approximately 17 pounds of particulates per ton of scrap iron melted. To actually determine the rate of emissions from the cupola would require a "stack test," a measurement in accordance with the American Society of Mechnical Engineers Power Test Codes ii - PTC-27, "Determining Dust Concentration in a Gas Stream." A stack test has never been run on Chase Foundry's cupola, with the result that the OEPA's assertion that the cupola emits 17 pounds of

particulates per ton of scrap melted has never been substantiated, and remains to this date simply an assertion. Chase Foundry continues to take the position that it has not violated any of the regulations cited by the OEPA, and that the OEPA has never obtained and did not provide on motion hearing proof of such violation.

Assuming that Chase Foundry committed the claimed violations, arguendo, it fell upon the trial court to enjoin the further operation of the cupopla "or to enter such other judgment, and orders enforcing such judgment, as the public interest and equities of the case required." R.C. §3704.06 (emphasis added).

As was acknowledged by the trial court, Chase Foundry is not a party which has resolutely refused to do anything to

satisfy the OEPA's regulations or demands for action. On the contrary, Chase Foundry's reasonable attempts to obtain control equipment and to in general satisfy the OEPA's demands, and the reactions of the OEPA to these attempts, have been previously discussed.

In addition to its decision to install a "wet cap collector" system earlier mentioned, Chase Foundry indicated to the OEPA on a number of occasions its willingness to purchase and install affordable equipment on the cupola if a control equipment manufacturer would guarantee ultimate compliance with the OEPA's regulations, or if the OEPA itself would agree to grant a variance to Chase Foundry if the installed equipment did not achieve strict compliance with the regulations. Despite Paul Smith's rather extensive

search, Chase Foundry has been unable to find a single manufacturer willing to guarantee its product. Likewise, the OEPA has proven itself uncooperative and inflexible in this regard, having informed Mr. Smith that any equipment purchased would be required to achieve the regulated reduction in emissions before a permit to operate would issue or variance would issue.

As a result, since the beginning of its confrontation with the OEPA, Chase Foundry has been faced with the risk of borrowing and investing what would be for Chase Foundry the expenditure of an enormous amount of capital for equipment which would possibly not be effective to cure this alleged emissions problem, only to then see its position with the OEPA not improve, and to still face threats of closure. Such a situation would be the

financial death of a venerable central Ohio enterprise, and of the jobs it provides.

Chase Foundry has never disputed that at all pertinent times it must have either a permit or a variance. Indeed, as earlier stated, Chase Foundry attempted to apply for a variance during the pendency of this case after it became clear the Orders could not be satisfied. The OEPA refused to even accept the application and referred further communication to the Assistant Attorney General handling the injunction action. Chase Foundry asserted in its application that it was entitled to a variance under R.C. §3704.03(H). Four of the five subsections in that statute are directly relevant to Chase Foundry's position (subsections 1-4) -- yet the OEPA refused to even accept Chase Foundry's submission.

In its letter in response to Chase Foundry's variance application, the OEPA stated that one deficiency of the application was Chase Foundry's failure to demonstrate either that the ambient air quality standards for particulates are being met in the Columbus region or that Chase Foundry's particulate emissions will not prevent or interfere with the attainment of this particulate standard. Another stated deficiency was Chase Foundry's failure to demonstrate that its facility does not prevent or interfere with the maintenance of ambient air quality standards for particulates. According to the OEPA in its letter, at the time of Chase Foundry's application, the ambient air quality standards for particulates were being violated in the Columbus region. As of March 28, 1983, said standards were <u>not</u> being violated in

the Columbus region, notwithstanding Chase Foundry's continued operation. Thus, both of these requirements have been met, since Chase Foundry has continued to do the same minimal level of cupola melting while, at the same time, the ambient air quality of the Columbus region has actually improved.

It has long been the law that one who has acted unjustly cannot obtain equitable relief. There can be no doubt but that the OEPA, by issuing Chase Foundry what the trial court found to be arbitrary, invalid and unreasonable orders, by coercing Chase Foundry into executing the above-mentioned Waiver, by discouraging Chase Foundry from taking substantial affirmative steps, and in ignoring the spirit and the letter of the statutory scheme for issuing variances, has rendered any potential equitable

action against Chase Foundry inequitable. But the equities of the case vis-a-vis the parties directly involved in this suit are not the only relevant considerations. The public interest also favors the position of Chase Foundry.

Notwithstanding the fact that Chase Foundry has in the past conditionally offered to assume the financial burden associated with the most affordable control equipment, Chase Foundry could theoretically install expensive control equipment, bring its cupola "into compliance" and actually increase its amount of emissions while still being "in compliance".

The irony inherent in the OEPA's desire to have Chase Foundry's cupola brought "into compliance" is that, given the manner in which Chase Foundry has

always operated its cupola, if Chase Foundry were to purchase and install the expensive control equipment apparently required by the OEPA, such an alteration could in fact bring about a modification of its operations so as to cause a net increase in the absolute amount of emissions, while still being "in compliance." Such fact is particularly pertinent in light of the OEPA's reference to "ambient air quality" in the Franklin County, Ohio area generally in its analysis of the Chase Foundry's alleged contribution to the area's environment and the reference to such data in the OEPA's determination of whether to grant or refuse variance applications.

The OEPA claims, but has not proven (or even tested to determine), that for each ton of scrap metal melted, the

cupola emits 17 pounds of particulates. Using the maximum figure of six tons of scrap per day, the claimed rate of emission would result in 102 pounds of particulates per day, or 408 pounds per week, at four days of operation per week. The OEPA insists that Chase Foundry must reduce the rate of emission by approximately 82%, to about three pounds per ton. However, since the cupola is not being operated at or near its daily or weekly capacity, Chase Foundry could install control equipment, reach the desired rate of emissions, and then operate the cupola five times as often each day, one or two extra days per week, and legally emit more particulates on an absolute basis than it is now claimed to emit. In fact, at Chase Foundry's present melting rate of four tons of scrap per hour, and at the

allowable emissions rate of three pounds of particulates per ton of scrap, if Chase Foundry were to melt scrap eight hours per day, five days per week, it would legally emit 480 pounds of particulates, or in excess of 70 pounds per week more than the OEPA claims is now being emitted!

The foregoing discussion demonstrates that the OEPA has ordered Chase Foundry to effect changes to its manufacturing process at a prohibitive cost so as to reduce the rate of emissions from a source with a claimed emissions rate which offends the OEPA but which is a source operated such a small portion of the time that its absolute emissions, whatever they truly are, are negligible. Chase Foundry sees neither equity nor service of the public interest in that proposed course of action -- nor did the trial court.

Indeed, the OEPA has not argued that the equities of this case require that an injunction issue against Chase Foundry. Rather, the OEPA argues that the 1980 Amendment to ORC §3704.06 during the pendency of this action removed the trial court's jurisdiction to consider "equities" before granting an injunction. Section 3704.06 as amended reads as follows:

> Prosecution by attorney general; injunction; complaint.
>
> The attorney general, upon the request of the Director of environmental protection, shall prosecute any person who violates Section 3704.05 of the Revised Code.
>
> The attorney general, upon request of the director, shall bring an action for an injunction or any other appropriate proceedings in any court of competent jurisdiction against any person violating or threatening to violate section 3704.05 of the Revised Code. The court shall have jurisdiction to grant injunctive

relief or enter such other judgment, and orders enforcing such judgment, as the public interest and equities of the case require. [Emphasis added.]

> Upon written complaint by any person, the director shall conduct such investigations and make such inquiries as are necessary to secure compliance with this chapter. The director may, upon complaint or upon his own initiative, investigate or make inquiries into any alleged violation or act of air pollution.

The OEPA's position has been that the trial court was automatically obligated to enter an injunction in this case in rubber stamp fashion. This position is untenable. The Court of Appeals' decision that the trial court possessed such unconscionably limited discretion in reaching equitable determinations in OEPA injunction cases is based on an incorrect interpretation of the case law construing equity jurisdiction over statutory injunctions and upon an improper and

unconstitutional theory of the general powers of Common Pleas Courts.

A precise statement of the law regarding the trial court's discretion to fashion an appropriate remedy under R.C. §3704.06 is found in the principles set forth by this Court in Hecht v. Bowles (1944), 321 U.S. 321, 88 L.Ed. 754 and Weinberger v. Romero-Barcelo, _____ U.S. _____, 72 Ed.2d 91, 102, S. Ct. _____ (1982). Precisly on point with the issues involved in the present controversy, this Court states:

> The question in this case is whether the Administrator, having established that a defendant has engaged in acts or practices violative of §4 of the Act, is entitled as of right to an injunction restraining the defendant from engaging in such acts or practices or whether the court has some discretion to grant or withhold such relief.
>
> [Hecht, supra, 88 L.Ed., p. 756 (emphasis added)]

* * *

Others provide that an injunction or restraining order shall be granted "upon a proper showing" that federal district courts shall have jurisdiction to restrain violations "for cause shown." The argument is that when Congress desired to give the district courts discretion to grant or withhold relief by injunction, it chose apt words to makes its desire plain. (See 3704.06(B); 3704.03(H), in case at bar).

[Hecht, supra, 88 L.Ed., p. 759; parenthetical added)

* * *

We do not stop to compare the provisions of §205(a) with the requirements of other federal statutes governing administrative agencies which, it is said, make it mandatory that those agencies take action when certain facts are shown to exist. We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." Meredith v. Winter Haven, 320 U.S. 228, 235, ant,

> 9, 13, 64 S.Ct. 7. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.
>
> [Hecht, supra, 88 L.Ed., p. 760, emphasis added]

This holding clearly demands that equity practice not be discarded or treated lightly simply because one party is of "public" character. The trial court's jurisdiction under R.C. §3704.06 must be construed in view of these well established principles.

In Weinberger, supra, the U. S. Navy was using an island near Puerto Rico for weapons training. The Governor of Puerto

Rico sought an injunction against the Navy on the ground that the Navy had not obtained a permit from the EPA. The District Court held that the Navy had violated the Federal Water Pollution Control Act. The district court ordered the Navy to apply for a permit, but refused to enjoin the Navy operations pending consideration of the permit application.

The First Circuit Court of Appeals held that the district court erred in undertaking a traditional balancing of competing equities. The Court of Appeals remanded the case with instructions to grant an immediate injunction. This court reversed.

Justice White, writing for the majority, began by noting that:

> [A]n injunction ... is not a remedy which issues as of course ...

(Weinberger, supra, 72 L Ed.2d at 98].

> The essence of equity has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.
>
> [Weinberger, supra, 72 L Ed.2d at 99]

This Court concluded as follows:

> Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the act.
>
> [Weinberger, supra, 72 L Ed.2d at 103]

Flexibility and discretion are particularly essential in weighing alleged violations under R.C. §3704.04. In particular, R.C. §3704.04(S) states that:

> The director of environmental protection may:
>
> * * *
>
> Issue, modify, or revoke orders prohibiting or abating emissions which violate applicable emission standards, or requiring emission control devices or measures in order to comply with applicable emission standards. In the making of such orders the director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of compliance with such orders, and their relation to benefits to the people of the state to be derived from such compliance.

By so providing, the Ohio legislature has determined that the public interest in any particular circumstance in seeking air pollution control is a complex matter, requiring careful weighing of all the relevant facts. The subjective decisions to be made under Chapter 3704 demand the flexibility inherent in equity jurisdiction to balance legisatively

recognized, sometimes competing considerations in order to determine where the public interest lies.

The radical departure from equity jurisdiction advocated by the OEPA is not even supported by the new statutory language itself. The statute, for example, specifically authorizes "mandatory" injunctive relief which, on its face, requires some meaningful judicial analysis of tne requirements to be mandated, as opposed to the pure negative restraint of injunction. Under reasonable interpretation and application of Ohio statutory law, the trial court obviously need not have become merely a rubber stamp for the OEPA, yet the Court of Appeals considered the statutes.

In Hecht v. Bowles, supra, 88 L.Ed., p. 761, this Court astutely commented:

We do not believe that such a

major departure from that long tradition as is here proposed should be lightly implied.

* * *

If Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities of §205(a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their tranditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. United States v. Morgan, 307 U.S. 183, 194, 83 L.Ed. 1211, 1218, 59 S.Ct. 795, and cases cited.

CONCLUSION

Does the Court of Appeals' decision mean that a Court is powerless to do anything other than summarily enter an injunction against the operation of Chase Foundry's plant even when confronted by the facts of the instant case? The Court's jurisdiction cannot be so unconscionably limited that it cannot fairly deal with a situation such as has been presented in the case at bar.

Chase Foundry does not contend that the significance of the trial court's decision is to allow it to indefinitely operate its cupola without a permit to operate or a variance. Chase Foundry applied for a variance and will apply again. Petitioner will expect that the OEPA fairly review and weigh the factors specified by Chapter 3704 before permits or variances are issued or denied.

However, Chase Foundry must be afforded the opportunity to continue in business for a reasonable time while it seeks to obtain a variance, in light of the reasons why Chase Foundry does not now have such a variance. The trial court's authority to enter such a judgment should be found to remain in place. Not only does the Court certainly have such authority under §3704.06 as it existed when this action was commenced, but the authority must also exist under §3704.06 as amended, consistent with the federal constitution.

Chase Foundry cannot Constitutionally and for the public good be required to cease operating on the evidence before the trial court. Indeed the evidence presented upon the parties cross-motions clearly supports the correctness of the

trial court's ruling favorable to Chase Foundry.

This Court should accept jurisdiction of this case in order to review the truly substantial constitutional questions involved herein, and to provide redress to Chase Foundry under circumstances in which the highest court in Ohio has refused to extend its jurisdiction over the matter.

Respectfully submitted,

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(614) 221-5834

Counsel for Petitioners

May 31, 1983

STATE OF OHIO	:	1983 TERM
City of Columbus	:	To wit: March 2,
	:	1983
Appellee,	:	No. 83-58
	:	APPEAL FROM THE
vs.	:	COURT OF APPEALS
	:	for Franklin
Chase Foundry &	:	County
Manufacturing Co.,	:	
	:	
Appellant.	:	

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, James W'm. Kelly, Clerk of the Supreme Court of Ohio, certify that the

foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of this Court this _____ day of _____ 19__.

_____, Clerk

_____, Deputy

59-275

A-2

THE STATE OF OHIO, City of Columbus.	:	1983 TERM To wit: March 2, 1983
State of Ohio, ex rel. William J. Brown, Attorney General, Appellee, vs. Chase Foundry & Manufacturing Co., Appellant.	:	No. 83-58 MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Franklin County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Brownfield, Bowen & Bally.

I, James W'm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19__.

_____, Clerk

_____, Deputy

59-275

IN THE COURT OF APPEALS
FOR FRANKLIN COUNTY, OHIO

State of Ohio, ex rel. William J. Brown, Attorney General of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 82AP-273
Chase Foundry and Manufacturing Company,	:	Regular Calendar
Defendant-Appellee.	:	

O P I N I O N
Rendered on November 16, 1982

MR. WILLIAM J. BROWN, Attorney General
MR. ROBERT J. STYDUHAR and
MR. JACK VAN KLEY, Assistants,
State Office Tower
Environmental Law Section
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For Plaintiff-Appellant.

BROWNFIELD, BOWEN & BALLY,
MR. C. WILLIAM BROWNFIELD,
MR. WILLIAM H. ARNOLD, of Counsel,
140 East Town Street,
Columbus, Ohio 43215,
For Defendant-Appellee.

GUERNSEY, J.

This is an appeal by the state of Ohio from a judgment of the Court of Common Pleas of Franklin County, in an action brought by the attorney general, said to be on relation of the state of Ohio, for prohibitory and mandatory injunctive relief against the defendant, Chase Foundry and Manufacturing Company. The parties have throughout referred to themselves as plaintiff and defendant, rather than relator and respondent, and for convenience we will do likewise.

The complaint filed on September 1, 1979, alleges, and the defendant admits, that it is engaged in the business of manufacturing at its facility in Columbus, Ohio, operating a melting furnace called a cupola which is used to produce gray iron castings; that, while

in operation, the cupola emits smoke; that, on August 7, 1978, the Director of Environmental Protection isssued certain findings and orders, a copy of which is attached to the complaint as exhibit A, which findings and orders speak for themselves; that the defendant has not replaced its cupola with an electric induction furnace, or replaced it on the schedule as set forth in paragraph 2 of the orders, and in exhibit A; and that defendant has not submitted written progress reports to the Environmental Protection Agency (hereinafter referred to as OEPA), as referred to in paragraph 4 of the orders in exhibit A.

The complaint also alleges, but the defendant does not admit, that, while in operation, the deffendant's cupola emits "air contaminants", as that term is defined in R. C. 3704.01(A), including

"particulate matter" as that term is defined in Ohio Adm. Code 3745-17-01(J); that the findings and orders included in exhibit A were issued pursuant to R. C. 3704.03(S); that (as to Count 1) defendant has violated Order No. 1 by failing to either install pollution control equipment on the cupola, or to replace the cupola with an electric induction furnace; that (as to Count 2) defendant has violated the requirements of Order No. 2 by failing to meet the scheduled achievement deadlines set forth in the compliance schedule; that (as to Count 3) defendant has violated the requirements of Order No. 4 by failing to submit written progress reports to the OEPA; that (as to Count 4) the operation by the defendant of its cupola causes the emission of particulate matter as defined in Ohio

Adm. Code 3745-17-01(J), in excess of that allowed by Ohio Adm. Code 3745-17-11; that (as to Count 5) the operation of the cupola causes the emission of visible air contaminants as defined in R. C. 3704.01(A) in excess of that allowed by Ohio Adm. Code 3745-17-07; and that (as to Count 6) defendant's cupola is a source of air contaminants operating without a permit to operate in violation of Ohio Adm. Code 3745-35-02.

The complaint prayed (A) that defendant be enjoined from operating its cupola until such time as a permit to operate has been obtained; (B) that the defendant be ordered to comply as soon as possible with all terms and conditions of Orders Nos. 1, 2 and 4, contained in exhibit A; (C) that defendant be enjoined from violating

Ohio Adm. Code 3745-17-07; and that defendant be enjoined from violating Ohio Adm. Code 3745-17-11.

The trial court, on March 16, 1982, entered a judgment dismissing the action pursuant to its granting defendant's motion for summary judgment and denying plaintiff's cross-motion for summary judgment for "the reasons stated in the written Decision rendered *** on March 3, 1982." That decision treats only the validity under R. C. 3704.03(S) of the findings and orders set forth in exhibit A to the complaint and determines that they are void because the Director of Environmental Protection "failed to take into account the economic reasonableness of said findings and orders."

The plaintiff makes the following assignments of error:

"1. The court erred in granting judgment to defendant by excusing defendant's unlawful conduct of operating an air contaminant source without an Ohio EPA permit to operate.

"2. The court erred in granting judgment to the defendant by excusing defendant's violations of Ohio EPA Administrative orders in the following respects:

"A. The court lacked jurisdiction to examine the validity of the administrative orders;

"B. The court was barred by res judicata from examining the validity of the administrative orders;

"C. The court was barred from examining the validity of the administrative orders by the defendant's express waiver of its right to collaterally attack the orders;

"D. In holding the administrative orders invalid, the court applied an erroneous standard of law, i.e. that the Ohio EPA, prior to issuance of an order, must examine the wealth of the recipient of the order; and

"E. Assuming the trial court applied the correct standard of law, the granting of summary judgment that the administrative orders were invalid was erroneous due to the presence of issues of material fact."

We shall consider these assignments of error in reverse order.

The second assignment of error pertains to the trial court's action in finding the administrative orders made by the Director of Environmental Protection on August 7, 1978 void, pursuant to defendant's motion for summary judgment.

It should be observed initially that the cause before the trial court does not readily lend itself to review on the basis of the arguments because of the condition of the record from the standpoint of summary judgment proceedings. Neither the motion of plaintiff nor the cross-motion of

defendant for summary judgment details the evidentiary documentation relied upon by each movant in support of his, or its, respective motion. The principal affidavit of the officer of defendant is not made specifically on personal knowledge, includes allegations of fact and argument not admissible in evidence, and does not show that the affiant is competent to testify to all the matters stated therein. Documents relied upon by the parties and attached as exhibits to various memoranda are not made exhibits to affidavits and are neither sworn nor certified. Four depositions filed in the cause remain sealed and were obviously not considered by the trial court. The original of two other depositions with exhibits thereto are missing from the file. Finally, the judgment of the trial court, and its decision, does not

disclose the evidentiary documentation either before the court on the motions, or relied upon by the court in arriving at its decision.

Nevertheless, there are controlling and undisputed facts which enable us to arrive at dispositive determinations as a matter of law.

Basic to Ohio's implementation of the Federal Clean Air Act by legislation enacted and regulations adopted prior to August 7, 1978, and effective at the time of the rendering by the director of the orders in question, is the concept that no person may permit the operation of any air contaminant source, air conteminants (including smoke), being defined by R. C. 3704.010(A), without applying for and obtaining a permit to operate from the OEPA R. C. 3704.03(G) and Ohio Adm. Code 3745-35-02. As the defendant has

admitted that its cupola, when operating, emits smoke, there is no question that it is an air contaminant source and that its continued operation was, and is, subject to the possession of a permit. An exception to the permit requirements, when the operator cannot make a satisfactory showing to the director that its equipment is being operated in compliance with applicable emission standards and other regulations, and when the air contaminant source emits any air pollutant in violation of any applicable air pollution control law, is the variance prescribed by R. C. 3704.03(H) and Ohio Adm. Code 3745-35-03, which may be issued by the director in compliance with such sections. In effect, a permit, if the operator can show compliance with clean air standards, is issued substantially as a matter of right;

whereas, a variance, if the operator can show as provided by the statutes and regulations, either excusable hardship or an ability in time to comply with clean air standards, is granted substantially as a matter of grace or privilege in the exercise of a sound discretion by the director.

Here, the findings and orders (exhibit A to the complaint) constituted yet another alternative to a permit, being executed substantially in the form of a variance but issued, instead, under the provisions of R. C. 3704.03(S) and (I) and R. C. 3704.031, as well as in accordance with Section 113(d) of the Clean Air Act, as amended, Section 7401, Title 26, U.S. Code, et seq. Under such authority, the orders permitted delayed compliance beyond the termination date in defendant's variance which had previously

expired. The orders specified that final compliance with state and federal statutes and regulations shall be achieved by July 1, 1979. Admittedly, the defendant did not achieve final compliance by that date and it appears in the record and was admitted at oral argument on appeal that the defendant has not been granted a permit to operate its cupola. It also appears that the defendant does not possess a current variance or any other order allowing current operation of the cupola.

Thus, under either the specific terms of the orders of August 7, 1978, or by operation of the provisions of Section 113(d) of the Clean Air Act, Section 7413(d), Title 42, U.S. Code, then in effect, which prohibited time extensions for compliance beyond July 1, 1979, the operation of the orders respecting both

the privilege of temporarily continuing non-complying emissions as well as the obligations of compliance expired and terminated on July 1, 1979. After that date, any substantive or procedural issues pertaining to the issuance of such orders and their validity, with respect to the relief sought in the first three counts of the complaint, became moot. Cf. Cleveland Electric Illum. Co. v. Williams (1977), 55 Ohio App. 2d 272, 282.

Although there is respectable authority that the orders under consideration were not void ab initio (State, ex rel. Stough, v. Bd. of Edn. (1977), 50 Ohio St. 2d 47), and that the principles of res judicata apply preventing the trial court from reviewing whether or not the Director of the Ohio Environmental Protection Agency properly

considered the economic factors involved (State, ex rel. Stough, v. Bd. of Edn., supra; Cincinnati, ex rel. Crotty, v. Cincinnati (1977), 50 Ohio St. 2d 27; State, ex rel. Williams, v. Bozarth (1978), 55 Ohio St. 2d 34; and Warren Molded Plastics, Inc., v. Williams (1978), 56 Ohio St. 2d 352), these issues, as well as all the other issues raised by the appellant under the second assignment of error, were moot in the determination of whether or not the plaintiff was entitled to an injunction against the defendant under the first three counts of the complaint.

As to these counts, plaintiff's prayer was that the defendant and its agents be ordered "to comply with all terms and conditions of Order numbers One (1), two (2), and four (4) *** as soon as possible." However, the orders had

terminated and the Director of Environmental Protection has done nothing to permit noncompliance or two require compliance after July 1, 1979. For the trial court to order compliance after July 1, 1979, would, in effect, be a substitution of that court's judgment and discretion for that of the director, would be the making of an order not authorized by law, and would not be the enforcement of the orders of August 7, 1978, which terminated on July 1, 1979. After that date, any injunctive relief is not available under the orders of August 7, 1978, or by reason of the noncompliance with such orders, but is available, if at all, by reason of continued violations of the clean-air standards and the statutes and regulations applicable when the operator possesses no permit, no variance, and no

other order allowing non-complying emissions.

Accordingly, the trial court committed technical error in refusing an injunction and dismissing the entire complaint on the ground that the orders under consideration were void. However, for the reasons heretofore stated, the plaintiff was not entitled to an injunction for any supposed violation of the August 7, 1978 orders and, therefore, not entitled to injunctive relief under any of the first three counts of the complaint.

We return then to a consideration of the first assignment of error.

As we have already seen, it is undisputed that the defendant, in the operation of its cupola, was, at the time the complaint was filed and still is emitting an air contaminant, smoke, from

an air conteminant source, its cupola, without a permit in violation of R. C. 3704.06 and Ohio Adm. Code, Section 3745-35-02. As we have also seen and determined at the time of, and since the time of, filing the complaint, the defendant has not possessed a currently applicable variance or any other order allowing the emission of such air contaminant in the absence of a permit.

This situation brought into force and effect the enforcement provisions of R. C. 3704.06 requiring the attorney general, upon request of the director, to bring an action for an injunction (or any other appropriate proceedings) against the defendant.

At the time the complaint was filed, R. C. 3704.06(B) then prescribed:

> "*** The Court shall have jurisdiction to grant injunctive relief or enter

> such other judgment, and orders enforcing such judgment, as the public interest and equities of the case require."

The defendant claims that the phrase "as the public interest and equities of the case require", is applicable to and qualifies the phrase, "grant injunctive relief", and that, before an injunction is granted, the trial court must balance the public interest and equities against the interest and equities favorable to the defendant.

It is also arguable that the last phrase of the sentence is applicable to and qualifies only the words "or enter such other judgment, and orders enforcing such judgment."

However, effective December 19, 1980, while this action was pending and before either party had moved for summary judgment, the General Assembly amended

the quoted sentence of R. C. 3704.06(B) dealing with the jurisdiction of the court to read:

> "*** The court shall have jurisdiction to grant prohibitory and mandatory injunctive relief and to require payment of a civil penalty upon the showing that such person has violated Chapter 3704. of the Revised Code or regulations adopted thereunder."

The amending act, 138 v. S258, did not prescribe that the amendment would be applicable to pending proceedings, nor did it prescribe otherwise.

In our opinion, the quoted portion of the amendment to R. C. 3704.06(B) is of a remedial or procedural nature and not substantive. In Kilbreath v. Rudy (1968), 16 Ohio St. 2d 70, the Supreme Court held in the second paragraph of the syllabus:

> "Laws of a remedial nature providing rules of practice,

> courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws (Paragraph one of the syllabus of State, ex rel. Holdridge, v. Indus. Comm., 11 Ohio St. 2d 175, approved and followed. Cincinnati, Hamilton & Dayton Rd. Co. v. Hedges, 63 Ohio St. 339, criticized.)"

Although this rule of law was applied in Kilbreath, supra, to a situation where a cause of action had accrued but the complaint had not been filed, its application was extended by the Supreme Court in Denicola v. Providence Hospital (1979), 57 Ohio St. 2d 115, to situation, as here, where the amendment became effective after the complaint had been filed, but before trial. The amendment here was thus applicable prospectively to the trial court's determination of the summary judgment motion of the plaintiff as to whether an injunction should be

granted against the defendant under count 6 of the complait alleging a continuing statutory violation. Accordingly, as determined in Ackerman v. Tri-City Geriatric & Health Care, Inc. (1978), 55 Ohio St. 2d 51, 56, the statute granting a specific injunctive remedy to the state:

> "*** the party requesting the inuunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law ***.' Stephan v. Daniels (1875), 27 Ohio St. 527, 536. (See, also, State v. Alexander Brothers, Inc. [1974], 43 Ohio App. 2d 154; 29 Ohio Jurisprudence 2d 176, Injunctions, Section 13; and 42 American Jurisprudence 2d 776, Injunctions, Section 38, for further support of the propositions that the traditional concepts for the issuance of equity injunctions do not apply in statutory injunction actions.)"

Justice William Brown additionally said in Ackerman, supra, at page 57 that:

> "*** R. C. 3721.08 was designed by the General Assembly to benefit society by proscribing behavior (the unlicensed operation of nursing homes) which the General Assembly has determined not to be in the public interest. It would, therefore, be redundant to require the Director of Health to show irreparable damage or lack of an adequate legal remedy once he has already proved that the conditions which the General Assembly has deemed worthy of injunctive relief exist. In addition, it would be inappropriate to balance the equities or require the Director of Health to do equity in an R. C. 3721.08 injunction action because R. C. 3721.08 injunctions and similar injunctions which authorize a governmental agent to sue to enjoin activities deemed harmful by the General Assembly are ot designed primarily to do justice to the parties but to prevent harm to the general public. ***"

In our opinion, the rules and observations thus set forth in Ackerman, supra, are equally applicable to the situation here, and the trial court committed error prejudicial to the appellant in dismissing the complaint without sustaining the appellant's cross-motion for summary judgment and rendering judgment granting the injunction sought by count 6 of the complaint.

Although it is not fully apparent as to how same is part of the trial court record pertinent to this appeal, the defendant has referred, both in its brief and in its oral argument, to the fact that, during the pendency of the cause in the trial court, it applied for a variance to permit it to operate its cupola and that the application was returned without action. Suffice it to

say, we do not deem this relevant to the issue of injunctive relief because neither the clean-air statutes nor the clean-air regulations provide that noncomplying emissions may be continued without order during the pendency of an application for a variance. If the defendant has been aggrieved by a lack of action on its application, its remedies lie other than in this cause.

For rendering summary judgment for the defendant dismissing the entire complaint for the wrong reasons, and for failing to render summary judgment for the plaintiff on the plaintiff's cross-motion for summary judgment for an injunction as prayed for under count 6 of the complaint, both of which actions were prejudicial to the plaintiff, the assignments of error are sustained for the reasons and to the extent indicated;

and the judgment of the Court of Common Pleas of Franklin County must be reversed and the cause is remanded with instructions to enter final judgment for the plaintiff, granting an injunction on count 6 of the complaint, and for the defendant on the first three counts of the complaint. As this leaves the fourth and fifth counts of the complaint, which did not involve the administrative orders and were not involved in the plaintiff's motion for summary judgment, unresolved, the cause is also remanded to the trial court for further proceedings on those counts. The assignments of error are sustained.

Judgment reversed; and cause remanded with instructions.

WHITESIDE, P.J., and NORRIS, J., concur.

GUERNSEY, J. of the Third Appellate District, sitting by designation in the Tenth Appellate District.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, ex rel. William J. Brown, Attorney General of Ohio,	:	
Plaintiff-Appellant	:	
v.	:	No. 82AP-273
	:	(Regular
Chase Foundry and Manufacturing Company,	:	Calendar)
Defendant-Appellee.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on November 16, 1982, the assignments of error are sustained to the extent indicated, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court with instructions to enter final judgment for the plaintiff, granting an injunction on

court 6 of the complaint, and for the defendant on the first three counts of the complaint, and for further proceedings on the fourth and fifth counts of the complaint.

WHITESIDE, P.J., NORRIS & GUERNSEY, JJ.

By _____

Judge J. Thomas Guernsey, of the Third Appellate District, sitting by assignment in the Tenth Appellate District.

cc: Robert J. Styduhar and
Jack Van Kley
C. William Brownfield and
William H. Arnold

STATE OF OHIO, ex rel. William J. Brown, Attorney General of Ohio,	:	
Plaintiff,	:	Case No.
v.	:	Case No. 79CV-09-4495
CHASE FOUNDRY & MANUFACTURING CO.,	:	Judge Martin
Defendant.	:	

JUDGMENT ENTRY

For the reasons stated in the written Decision rendered by this Court on March 3, 1982, the Defendant's Motion for Summary Judgment is hereby granted, and Plaintiff's Cross-Motion for Summary Judgment is hereby denied.

This action is dismissed, costs to Plaintiff.

_____
Judge

APPROVED:

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COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

State of Ohio, ex rel. William J. Brown, Attorney General of Ohio,	:	
Plaintiff,	:	
vs.	:	Case No. 79CV-09-4495
Chase Foundry & Manufacturing Co.,	:	
Defendant.	:	

DECISION

Rendered this _____ day of March, 1982. MARTIN, J.

The State of Ohio has instituted the present action seeking injunctive relief and the assessment of fines against Defendant Chase Foundry & Manufacturing Co. Now before the Court are Plaintiff's and Defendant's cross-motions for summary judgment. Plaintiff, on behalf of the Director of Environmental Protection, has alleged that the Defendant is polluting,

to wit: emitting air contaminants as defined in Ohio Administrative Code Regulation 3745-17-01(J) in excess of that allowed by Regulations 3745-17-11 and 3745-17-07. Plaintiff alleges that these air contaminants are emitted from the grey iron cupola that is operated by Defendant foundry. Plaintiff has also alleged that Defendant has failed to adhere to the orders ostensibly promulgated by the Director of Environmental Protection pursuant to Ohio Revised Code Section 3704.03(B) and issued on August 7, 1978. Defendant has denied that it pollutes in violation of the aforementioned sections but does admit that it has not complied with said orders. Said orders were issued conjunctive with findings and said findings stated that Defendant emitted particulants and smoke in violation of

Ohio's Environmental Protection laws. Defendant admits signing a waiver to the right of review of said findings and orders with respect to their validity. It thus appears to this Court that if said waiver is effective, then Defendant is in violation of the state statutes regarding air contaminants and enjoinment of Defendant's activities until compliance is met with said orders should take place.

The threshhold determination with respect to this action must be (1) whether the findings of fact and order issued by the Director to the Defendant met the requirements of Ohio Revised Code Section 3704.03(S) and, (2) whether the waiver executed by Paul Chase [sic] on behalf of the Chase Foundry was valid and effective. Once said determinations are made, it must be this Court's decision to

either issue the Plaintiff's requested injunctive relief or deny the same.

There is no contention by Plaintiff that the Director failed to accept financial data from the Defendant before he issued his findings and orders. Although the findings themselves state that they are promulgated pursuant to Section 3704.03(S) of the Ohio Revised Code, the interrogatories and other eivdence presented to this Court indicate that no financial scrutiny was attempted by Plaintiff before the findings and orders were issued. The pertinent portion of Section 3704.03(S) states that the Director shall "to the extent consistent with the Federal Clean Air Act, give consideration to and base his determination on evidence relating to the technical feasibility and economic reasonableness of compliance with such

orders, and their relation to the benefits to the people of the state to be derived from such compliance." ("to the extent consistent with the Federal Clean Air Act" is an amendment added to the original statute and made effective December 10, 1980.)

The mandatory language of said section requires Plaintiff to assume the burden of showing complaince with said considerations and it is uncontroverted that the Director failed to consider Chase Foundry's economic status but rather, based upo a state-wide survey, decided that since other foundries in the state were able to follow such a course as was dictated to Chase Foundry in said orders, Chase Foundry should have been able to do so. It is this Court's opinion that the Director should have, but did not, give consideration to and

base his determinations on the economic reasonableness of compliance with respect to the individual Defendant.

This finding does not determine the instant matter, however, since Defendant executed a waiver which puportedly waived any rights to further review of said findings and orders. Based upon the case of Parente v. Day, 16 Ohio App. 2d 35 (1968), a determination must be made as to whether the findings and orders are matters that are void or merely voidable.

It is this Court's opinion that the Director failed to issue his findings in consonance with the previously discussed statutory requirements. In order for the findings to have a validity from the point of their origination, they must meet said statutory requirements and the Director having failed to take into

account the economic reasonableness of said findings and orders, this Court must find that they are void and not merely voidable. While the waiver was apparently intelligently made and supported by consideration, it is not legally effective to estop Defendant from asserting the invalidity of the findings.

The State of Ohio in this action has requested injunctive relief and monetary fines. It must be this Court's decision, based upon the reasoning supra, that the State failed to show a right to injunctive relief. Accordingly, Plaintiff's motion for summary judgment is OVERRULED and Defendant's motion for summary judgment is SUSTAINED. Counsel for defendant shall prepare a judgment entry accordingly.

Paul W. Martin, Judge

APPEARANCES:

Robert J. Styduhar, A.A.G.
Attorney for Plaintiff

C. William Brownfield
Attorney for Defendant

PROPOSITION OF LAW NO. I:

THE 1980 AMENDMENT TO OHIO REVISED CODE §3704.06 ENACTED DURING THE PENDENCY OF AN ACTION INITIATED BY THE OHIO ATTORNEY GENERAL ON BEHALF OF THE OHIO E.P.A. APPLIES PROSPECTIVELY ONLY AND DOES NOT ALTER THE JURISDICTION OF THE TRIAL COURT AS THE SAME EXISTED AT THE TIME THE ACTION WAS FILED.

PROPOSITION OF LAW NO. II:

WHERE AN INJUNCTION ACTION WAS BROUGHT BY THE OHIO ATTORNEY GENERAL ON BEHALF OF THE OHIO E.P.A. PURSUANT TO R.C. §3704.06 PRIOR TO ITS AMENDMENT IN 1980, THE TRIAL COURT HAD JURISDICTION AND AUTHORITY TO DETERMINE THAT SUCH INJUNCTION SHOULD OR SHOULD NOT ISSUE BASED, INTER ALIA, UPON GENERAL PRINCIPLES OF EQUITY, WHETHER OR NOT SUCH AMENDMENT WAS PROPERLY APPLIED RETROSPECTIVELY, SUCH EQUITABLE PRINCIPLES BEING APPLICABLE BOTH PURSUANT TO SAID STATUTE, AS AMENDED, AND UNDER CONSTITUTIONAL LAW.

PROPOSITION OF LAW NO. III:

WHERE A FOUNDRY COMPANY, WHILE OPERATING UNDER A VARIANCE ISSUED BY THE OEPA, AS EXTENDED BY FINDINGS AND ORDERS, COULD NOT COMPLY WITH SUCH FINDINGS AND ORDERS SUBSEQUENTLY FOUND BY THE COMMON PLEAS COURT TO HAVE BEEN ISSUED IN VIOLATION OF THE STATUTORY REQUIREMENTS OF §3704.03(S), AND FOLLOWING ISSUANCE

OF SUCH FINDINGS AND ORDERS THE COMPANY APPLIED FOR A VARIANCE, ONLY TO HAVE THE APPLICATION RETURNED BY THE OEPA AS IF NOT FILED, SUCH FACTORS WERE PROPERLY CONSIDERED BY THE COURT FAVORABLY TO THE DEFENDANT COMPANY IN AN ACTION BROUGHT BY THE ATTORNEY GENERAL ON BEHALF OF THE OEPA TO ENFORCE SAID FINDINGS AND ORDERS AND TO ENJOIN THE OPERATION OF THE COMPANY'S PLANT ON THE GROUNDS THAT THE COMPANY DID NOT HOLD A CURRENT VARIANCE OR PERMIT.

PROPOSITION OF LAW NO. IV:

WHERE THE OEPA REFUSED TO CONSIDER A VARIANCE APPLICATION FILED DURING THE PENDENCY OF A COURT ACTION BROUGHT BY THE ATTORNEY GENERAL ON BEHALF OF THE OEPA, RETURNING THE VARIANCE APPLICATION AS IF NOT FILED AND STATING THAT ANY COMMUNICATION CONCERNING THE APPLICATION MUST BE DIRECTED TO THE ASSISTANT ATTORNEY GENERAL RESPONSIBLE FOR LITIGATION PENDING AGAINST THE COMPANY, SUCH CONDUCT AND THE SUBSEQUENT ORDER FOR ISSUANCE OF INJUNCTION BY THE COURT OF APPEALS IN REVERSING THE TRIAL COURT, CONSTITUTED A DENIAL OF DUE PROCESS OF LAW AND A VIOLATION OF THE DEFENDANT'S RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND BY ARTICLE I, SECTION 2, ARTICLE I, SECTION 16, AND ARTICLE II, SECTION 26 RESPECTIVELY OF THE OHIO CONSTITUTION, WHERE THE OEPA IN SUCH ACTION HAD DEMANDED AN INJUNCTION AGAINST FURTHER OPERATION

OF THE COMPANY'S FOUNDRY WITHOUT SUCH CURRENT PERMIT OR VARIANCE.

PROPOSITION OF LAW NO. V:

WHERE A GREY-IRON CASTINGS PLANT UTILIZED ITS CUPOLA LESS THAN SIX HOURS PER WEEK, ONE AND ONE-HALF HOURS PER DAY, FOUR DAYS PER WEEK, IT WAS PROPER FOR THE TRIAL COURT TO CONSIDER SUCH LIMITED ACTIVITY AND THE LEVEL OF TOTAL STACK EMISSIONS IN AN ACTION BROUGHT BY THE OHIO ATTORNEY GENERAL ON BEHALF OF THE OHIO E.P.A. PURSUANT TO OHIO REVISED CODE §3704.06 TO ENJOIN THE CONDUCT OF THE DEFENDANT'S OPERATIONS.

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CLERK

CASE NO. 82–1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHASE FOUNDRY & MANUFACTURING CO.,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES SUPREME COURT HAS JURISDICTION TO CONSIDER FEDERAL QUESTIONS WHICH WERE NEITHER RAISED NOR DECIDED IN THE STATE COURTS BELOW.

2. WHETHER THE SEPARATION OF POWERS DOCTRINE OF THE UNITED STATES CONSTITUTION APPLIES TO THE STATES, AND IF SO, WHETHER A STATE STATUTE REQUIRING A STATE COURT TO HALT VIOLATIONS OF STATE LAW CONTRAVENES THE REQUIREMENT FOR SEPARATION OF POWERS.

3. WHETHER A STATE STATUTE REQUIRING A STATE COURT TO ISSUE AN INJUNCTION TO HALT VIOLATIONS OF STATE LAW CONTRAVENES THE PRINCIPLES OF DUE PROCESS.

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JURISDICTION

Because the federal questions presented in the petition were not raised or described in the state courts below, the Court has no jurisidction over this matter. See Part I of Reasons Why The Writ Should Be Denied, *infra*, page 8.

STATEMENT OF THE CASE

Petitioner Chase Foundry & Manufacturing Co. ("Chase Foundry" or "Chase") has devoted a considerable portion of its petition to a highly misleading argument on the facts, almost to the exclusion of any discussion of the law. Throughout the history of this litigation before the state courts and now before the Supreme Court, Chase Foundry has repeatedly attacked the Ohio Environmental Protection Agency ("Ohio EPA") in hopes of putting the Agency on trial and diverting attention from its indefensible violations of law. The state Court of Appeals and the Ohio Supreme Court saw through this tactic and ruled against the company. Because most of the factual allegations of Petitioner are irrelevant to the legal issues raised in the petition, Respondent will not attempt to correct all of the factual misstatements made in the petition, but will merely address those most important to an understanding of the legal issues involved.

Unlike most of the foundries in the state of Ohio, Petitioner Chase Foundry & Manufacturing Co. has refused to comply with the state air pollution laws designed to protect the health of the people of Ohio. The history of this corporation's noncompliance began more than ten years ago when Ohio's air pollution control program was formulated. In April of 1973 Chase Foundry was notified that the cupola (blast furnace) at its Columbus plant was emitting pollutants into the air at a rate in excess of that allowed by Ohio air pollution rules. On June 8, 1974, the Ohio environmental protection Agency ("Ohio EPA") issued Chase a variance*

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*As the Court of Appeals for Franklin County explained in its opinion below, a variance is a temporary exemption from Ohio air pollution rules

allowing the company more than a year to comply with the rule.** After the corporation failed to meet the deadline for compliance in its variance, Ohio EPA in March of 1976 suggested that Chase Foundry file an application for another variance in order to obtain another extension of time, allowing the company until April 15, 1977 to comply.

Chase Foundry, however, did not file the variance application, resulting in a strongly worded letter from the Director of Ohio EPA to the company informing Chase that further non-compliance would not be tolerated. A second letter from the Director to the company followed on January 31, 1978. Chase Foundry's President responded by writing his Congressman and arranging meetings with the Governor.

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* *contd.*

granted substantially as a matter of grace by the Director of Ohio EPA to a polluter who has shown excusable hardship or who has demonstrated that he needs additional time to comply with clean air requirements. A variance is a substitute for a permit to operate, which can be obtained only when the permittee complies with the air pollution laws, and without which a person cannot legally emit pollutants into the air. See the Court's opinion found in the Appendix to Chase Foundry's Petition, pages A-14 and A-15. Contrary to the bold assertions in the Petition, most of Ohio's industries comply with Ohio air pollution laws and as a result possess permits to operate, not variances.

**During this time, Paul Smith, the president of Chase Foundry, told Ohio EPA that he was considering the installation of a device known as a "wetcap," a device cheaper than most alternative air pollution control equipment. When informed by Ohio EPA that this device in the past had sometimes been ineffective to adequately control air pollutants, Mr. Smith offered to install the wetcap at the foundry if Ohio EPA would guarantee to issue Chase Foundry a permit or variance even if the wetcap was not effective. When Ohio EPA insisted that Chase Foundry, like its competitors in the foundry business, install effective equipment, the company abandoned any plans it might have had to install control equipment.

That course of action by Chase Foundry resulted in a series of negotiating sessions between Chase Foundry and the Ohio EPA held for the purpose of providing the company with yet additional time to comply with Ohio's air pollution requirements. These discussions culminated in the issuance of negotiated administrative findings and orders on August 7, 1978, which postponed Chase Foundry's compliance date to July 1, 1979. Due to the company's prior history of footdragging, Ohio EPA feared that Chase would pursue administrative appeals of the very same orders the company had negotiated, thus tying up the orders in litigation and delaying the company's ultimate compliance for a time period longer than the year specified in the orders. As a result, Ohio EPA required Chase to waive judicial review of the orders in exchange for the additional grace period.

Following receipt of the orders, Chase Foundry did not contact the Ohio EPA until January of 1979, when its president "painfully reported" to the Ohio EPA that his company was not in compliance with the schedule provided in the orders, blaming labor problems and adverse economic conditions. Chase Foundry's cry of economic woe, however, was not supported by the company's own 1978 balance sheet, which showed that the company had increased sales and dividends over the previous year, with a profit of $100,006.00, a cash balance of $74,749.00, retained earnings of over $666,000, and no long or short term debt.

In response to Chase Foundry's continued violation of the administrative orders and applicable air pollution control rules, the Ohio EPA referred the matter to the Ohio Attorney General's Office for legal action. Following this referral, Chase Foundry wrote to the Ohio EPA

admitting that it had failed to meet the compliance deadline set forth in the administrative orders, again citing cost as the reason for its non-compliance.

As before, defendant's pleas of poverty were unsupported by its balance sheet for fiscal year 1979, which showed profits of $90,347, dividends of $44,000, increased retained earnings of $712, 563, and no long or short term debt. The cost of compliance with the administrative orders, on the other hand, ranged from $53,000 to $100,000 for installation of acceptable pollution control equipment, or $85,000 to $110,000 to replace the cupola with an electric induction furnace.

Chase Foundry's real problem with installing air pollution control equipment, as Paul Smith stated in 1980, is the fact that it is non-productive capital equipment. Parke Smith, the company's vice-president, espoused the same view during his deposition in the proceedings before the state courts, as evidenced by the following illuminating exchange:

"Mr. Van Kley: And what are the reasons for not buying electric induction furnaces?

Mr. Smith: I would say that the primary reason that we are not convinced that, cost-wise, it's an appropriate thing for our company to do at the present time.

Mr. Van Kley: Any why not?

Mr. Smith: Well, because it would cost too much money.

Mr. Van Kley: Okay. Why don't you explain to us what you mean by your statement that, "It would cost too much money?"

Mr. Smith: We don't feel that it would be an appropriate return on our investment, we would receive an appropriate return on our investment.

Mr. Van Kley: Is that the only reason?

Mr. Smith: Yes."

Transcript of Deposition of Parke E. Smith, p. 8

Chase's attitude toward pollution control comes through clearly in the above discourse: the company will control its pollution only when it can make a profit on it.*

The State of Ohio filed a civil lawsuit in the Franklin County, Ohio, Court of Common Pleas against Chase Foundry during September of 1979, requesting an injunction against the illegal operation of the cupola until such time as air pollution controls were installed. Rather than seeking to comply with the Ohio air pollution statutes, Chase Foundry responded to the lawsuit by

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*Chase Foundry has continued its tale of econmic woe in its petition to this Court, contending that it has never had money adequate to buy control equipment. Several of the annual income figures presented in Petitioner's Statement of Facts, including the alleged 1982 operating loss, were never presented to the trial court below, nor were they supplied to the State in discovery.

applying for a variance, asking that it be totally excused from compliance with the laws.*

In March of 1982, in response to cross motions for summary judgment by the State and Chase Foundry, the Court of Common Pleas granted summary judgment to Chase Foundry on all six courts of the complaint, even though Chase had not requested summary judgment on two of the counts.

The State appealed the trial court's decision to the Franklin County, Ohio, Court of Appeals. The Court of Appeals reversed the trial court's judgment on Count Six of the complaint, which charged Chase Foundry with operating the cupola, an air contaminant source, without a permit to operate. The Court of Appeals ordered the trial court to grant summary judgment to the State on

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*This application contained none of the information necessary to tell whether the company could be legally given a variance, and was returned as incomplete. Chase Foundry has argued that it should be given a variance and be excused from air pollution laws because the air quality in Columbus has improved during the time Chase Foundry has been illegally polluting. In other words, Chase Foundry believes that is should be rewarded for ten years of defiance against state laws while other manufacturers have performed their duties to clean the air.

Chase Foundry has also threatened that it could operate its cupola more often if it is required to install controls, thus increasing the total amount of emissions while decreasing the rate of emission. To accept this argument, one must assume that Chase Foundry, perhaps overcome by some altruistic desire for clean air, presently limits its cupola's operating time to hold down its air contaminant emissions. If forced to comply with the law, the company will not be so inclined. In fact, however, Chase's hours of operation are limited by the nature of its business.

that count, since Chase had admitted in its answer that it was operating the cupola without a permit to operate.*

The appellate court also held that under Section 3704.06(B) of the Ohio Revised Code, state courts were required to enjoin illegal acts of air pollution, and had no discretion to excuse the violations through the exercise of their equity powers. The trial court was ordered to issue an injunction prohibiting the emission of contaminants from the cupola.

Chase Foundry filed a notice of appeal in the Ohio Supreme Court from the appellate court's decision on Count Six. The Ohio Supreme Court found that the company had presented no substantial constitutional questions to that court for review, and dismissed the appeal.

Chase Foundry now has petitioned this Court for a writ of certiorari, presenting this Court with two federal questions never raised or decided in the state courts below.

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*The Court of Appeals found that the three counts alleging violations of the orders had become moot. The appellate court reversed the trial court's judgment on the remaining two counts which were not the subject of summary judgment motions by either Chase or the State, and orderad the court to hear evidence on them. None of these five counts are involved in the petition to this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I. BECAUSE THE FEDERAL QUESTIONS PRESENTED IN THE PETITION WERE NOT RAISED OR DECIDED IN THE STATE COURTS BELOW, THIS COURT HAS NO JURISDICTION TO CONSIDER THESE ISSUES.

This Court has repeatedly ruled that it has no jurisdiction to consider federal questions presented by petitions for writs of certiorari to state courts where such questions have not been previously presented to or decided by the state courts. *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S. Ct. 1161, 1162-63, 22 L. Ed. 2d 398 (1969). Besides honoring the jurisdictional bar to granting writs under such circumstances, the Court has also noted that petitions containing federal questions not raised in state courts should be dismissed for several practical reasons as well. The record in such cases is not likely to be adequate to allow an informed decision to be made on the federal questions, since the parties did not litigate these issues below. 394 U.S., at 439 89 S. Ct., at 1163. In addition, because of its due regard for an appropriate relationship with the state courts, the Court has been especially careful not to pass on federal questions contesting the validity of state statutes where state courts have not first been given the opportunity to construe the statutes in a way that would save their validity or constitutionality. *Id.; Wilson v. Cook,* 327 U.S. 474, 483-84, 66 S. Ct. 663, 668, 90 L. Ed. 793 (1946). The petitioner to this Court has the burden of demonstrating that the federal questions were raised and decided in the state courts below. *Raley v. State of Ohio,* 360 U.S. 423, 435, 79 S. Ct. 1257, 1265, 3 L. Ed. 2d 1344 (1959).

Petitioner has presented two federal questions in its petition in hopes of persuading the Court to exercise jurisdiction over this case. The question concerning separation of powers between the executive and judicial branches of government (the second of Petitioner's "Questions Presented") was not raised or even mentioned in the state trial court, court of appeals, or supreme court. The propositions of law presented to the Ohio Supreme Court, attached to Chase Foundry's petition as appendix pages A-42 to A-44 in an apparent attempt to satisfy Petitioner's burden of showing that the federal questions were raised below, contains no reference to separation of powers. Nor did any of the state courts address a separation of powers issue in their decisions.

The first of Petitioner's "Questions Presented" alleges that Section 3704.06(B) of the Ohio Revised Code ("O.R.C."), which requires the issuance of an injunction against Chase Foundry's illegal operation of the cupola, is unconstitutional as a violation of due process. Although Chase Foundry in the Court of Common Pleas and Court of Appeals had charged that the issuance of the Findings and Orders violated due process (an issue which is now moot), the company did not contend that Ohio Revised Code Section 3704.06(B) was unconstitutional. In its memorandum seeking the jurisdiction of the Ohio Supreme Court, Chase Foundry argued for the first time that Ohio EPA's return of Chase's incomplete variance application violated due process, and reasoned that as a result, the issuance of an injunction for failure to have a permit to operate would also violate due process, because possession of a variance would have exempted the

company from permit requirements.* At no time did Petitioner challenge the constitutionality of O.R.C. Section 3704.06(B) in the state courts. The due process issue presented to this Court is entirely unrelated to the issue brought before the Ohio Supreme Court. Petitioner now asserts that the Ohio Legislature's restriction on the state courts' exercise of their equitable powers to excuse unlawful air pollution violates due process. The Court has ruled that it will not consider a federal constitutional issue such as this which has not previously been presented to the state courts below, even if the same clause of the constitution was involved in a different federal question which has been presented to the state courts. *Wilson v. Cook*, 327 U.S. at 483-84, 66 S. Ct., at 668. Because Petitioner's due process issue, as well as its separation of powers question, was not raised or decided in the Ohio state courts, Petitioner's request for a writ of certiorari should be dismissed or denied for lack of jurisdiction.

II. A STATE STATUTE REQUIRING A STATE COURT TO ISSUE AN INJUNCTION TO HALT VIOLATIONS OF STATE LAW DOES NOT CONTRAVENE THE PRINCIPLES OF DUE PROCESS.

This Court has often held that the Due Process Clause of the Fourteenth Amendment does not empower the courts to substitute their social and economic beliefs for the judgment of the legislative bodies elected to pass

*Like the Petition to this Court, Chase's Memorandum to the Ohio Supreme Court was almost devoid of discussion of constitutional issues. Chase Foundry's contention that the issuance of an injunction violates due process where a variance application was previously returned was "developed" only in a portion of one sentence in a thiry page memorandum.

the laws. *Ferguson v. Skrupa,* 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963). The judiciary is not entitled to label a statute unconstitutional just because it believes the statute to be unwise, but instead will uphold the law if it bears a reasonable relationship to a legitimate state interest. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213, 57 L. Ed. 2d 91 (1978).

There can be no doubt that air pollution laws are legitimate exercises of state police power which are consistent with the principles of due process. In *Northwestern Laundry v. City of Des Moines,* 239 U.S. 486, 36 S.Ct. 206, 60 L. Ed. 396 (1916), the Court responded to a due process challenge to a smoke law by declaring:

> So far as the Federal Constitution is concerned, we have no doubt that the state may. . .declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. *Nor is there any valid Federal Constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance.* [Emphasis added.] 239 U.S., at 491-92, 36 S.Ct., at 208.

See, also, *Hadacheck v. Sebastian,* 239 U.S. 394, 36 S.Ct. 143, 60 L. Ed. 348 (1915). Because air pollution laws have a rational basis for their enactment, i.e., the protection of the health of state citizens, they do not offend the principle of due process, even if compliance with these laws is expensive.*

The Court has also ruled that a state may vest other branches of government with powers ordinarily reserved for the judiciary without offending due process, holding:

> The objection that the act of 1899 [the state law in question] confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due process clause of the 14th Amendment.

Dreyer v. Illinois, 187 U.S. 71, 84, 23 S.Ct. 28, 32, 47 L. Ed. 79 (1902).

As the state courts in this case have ruled, Ohio Revised Code Section 3704.06(B) requires Ohio courts to enjoin illegal acts of air pollution. Because the Ohio legislature, after studying the air pollution problems of the state, decided that the illegal operation of polluting sources was contra to public policy, an Ohio court is not allowed to substitute its judgment for that of the legislature by allowing the pollution to continue. Because the rational basis for this statute is the safeguard of public health, it does not violate due process requirements. In addition, under this Court's holding in *Dreyer v. Illinois,*

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*This Court has also recognized that states are authorized by the federal Clean Air Act to promulgate air pollution rules without considering the economic or technical feasibility of complying with the rules. *Union Electric Co. v. EPA,* 427 U.S. 246, 96 S.Ct. 2518, 49 L. Ed. 2d 474 (1976).

supra, O.R.C. 3704.06(B) is not inconsistent with due process merely because the Ohio legislature has made determinations of public policy usually made by state courts pursuant to their equity powers.

Because Petitioner's petition is almost devoid of any discussion of constitutional law, it is difficult to determine the basis for Petitioner's allegation that O.R.C. 3704.06(B) violates due process. Apparently Chase Foundry is attempting to convince the Court that the Ohio legislature cannot constitutionally make the judgment that in cases where harmful air pollution is occurring, the equities favor the discontinuation of the pollution, rather than leaving state courts with the discretion to excuse the violation. However, under *Dreyer v. Illinois, supra,* allowing another branch of state government to exercise functions ordinarily exercised by the judiciary does not offend due process. Furthermore, while the evidence shows that Chase Foundry could afford control equipment (the company was especially financially healthy during the time the findings and orders required the purchase of control equipment), even if the company were found to discontinue operations as a result of a court order prohibiting pollution pursuant to O.R.C. 3704.06(B), the principles of due process would not be offended. *Northwestern Laundry,* 239 U.S., at 491-92, 36 S.Ct., at 208; *Hadacheck,* 239 U.S., at 407-10, 36 S.Ct., at 143-44. Petitioner's due process contention, therefore, is obviously meritless and not worthy of this Court's consideration.

III. A STATE STATUTE REQUIRING A STATE COURT TO ISSUE AN INJUNCTION TO HALT VIOLATIONS OF STATE LAW DOES NOT CONTRAVENE THE DOCTRINE OF SEPARATION OF POWERS.

A. THE DOCTRINE OF SEPARATION OF POWERS IN THE UNITED STATES CONSTITUTION IS NOT APPLICABLE TO STATE GOVERNMENTS.

In *Sweezy v. State of New Hampshire,* 354 U.S. 234, 77 S.Ct. 1203, 1 L. Ed. 2d 1311 (1957), this Court ruled:

> [T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.

354 U.S., at 255, 77 S.Ct., at 1214.

See also, *Dreyer v. Illinois,* 187 U.S. 71, 83-84, 23 S.Ct. 28, 32, 47 L.Ed. 79 (1902).

Because the federal separation of powers doctrine does not apply to state governments, Petitioner's argument that the Ohio legislature's enactment of O.R.C. 3704.06(B) unconstitutionally restricts the Ohio judiciary is meritless.

B. EVEN IF THE SEPARATION OF POWERS DOCTRINE APPLIED TO STATE GOVERNMENTS, O.R.C. 3704.06(B) WOULD NOT VIOLATE THAT DOCTRINE.

Even under federal law, the legislative branch of government may validly regulate and restrict the remedial powers of the judiciary. In *Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), for example, this Court listed seven federal statutes limiting the injunctive powers of federal courts, while making no indication that the statutes were invalid in any respect, 321 U.S., at 442, n. 8, 24 S. Ct., at 676, n. 8.

Neither of the two cases cited in Chase Foundry's petition provided any indication that legislatures cannot constitutionally limit the equitable discretion of the courts to enforce statutes or to refuse to enforce them. The cases cited by Petitioner were simply matters of statutory interpretation--the Court found that the statutes construed in these cases simply were not intended by Congress to limit the courts' equitable discretion. Petitioner's discussion of these decisions thus was not even relevant to constitutional issues, but addressed totally unrelated matters of federal statutory construction.

The cases cited by Petitioner, although not specifically addressing constitutional issues, acknowledged that Congress could have required the courts to enjoin violations of the statutes in question without considering equities. In *Hecht v. Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L. Ed. 754 (1944), the Court stated:

> [I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.

321 U.S., at 330, 64 S.Ct., at 592. And in *Weinberger v. Romero-Barcelo,* _____U.S._____, 102 S.Ct. 1798, 72 L. Ed. 2d 91 (1982), the Court explained:

> Of course, Congress may intervene and guide or control the exercise of the courts' discretion. . . .

102 S.Ct., at 1803. The Court continued to say that, in the statute construed by its previous decision in *TVA v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L. Ed. 2d 117 (1978), ". . .Congress had foreclosed the exercise of the usual discretion possessed by a court of equity." 102 S.Ct., at 1804. Thus, the very cases cited by Petitioner demonstrate that even on the federal level, the legislative branch may limit the equitable discretion of the judiciary. Even if federal separation of powers principles applied to the states, state statutes such as O.R.C. 3704.06(B) could validly require state courts to enjoin illegal activities once those violations were proven. Petitioner thus has failed to show any conflict between the Supreme Court's decisions and the state court decisions in the case at bar. (See Rule 17.1 of the Supreme Court Rules, which describes the character of reasons that will be considered in reviews of petitions for certiorari.) Petitioner's separation of powers contention, therefore, is not deserving of this Court's attention.

CONCLUSION

Petitioner's application to this Court for a writ of certiorari is merely another of many delaying tactics Chase Foundry has used to postpone its ultimate compliance with Ohio air pollution laws, in utter disregard for the health and comfort of the Columbus citizens living near the plant. Petitioner's delay game is obvious, *inter alia,* from discussion in its petition concerning the incomplete variance application which was returned to Chase Foundry. Chase states that the variance application was submitted to Ohio EPA once, and promises to file another application, but begs the Court to force the state courts to delay injunctive relief so that the company can continue business as usual "for a reasonable time while it seeks to obtain a variance. . ." Petition, p. 47. This raises an interesting question. Since the incomplete variance was returned *over three years ago,* why has Chase not completed the application and resubmitted it yet? Presumably, Chase Foundry is saving this delay device until after the Supreme Court has disposed of this petition, when the company will file the application. Chase will then urge the state trial court to delay injunctive relief until the variance application has been processed and all appeals therefrom have been exhausted.

It is also instructive to note that, while there are references in the petition to Chase's intentions to avoid installation of control equipment in the future, nowhere has the company requested a delay in injunctive relief to allow more time to install equipment, even though the company, like its foundry competitors, possesses the financial ability to control its grievous air pollution. Obviously, Chase Foundry will not seriously consider that option until the day after the injunctive has been issued.

Because the federal questions presented by Chase Foundry to this Court were not raised or decided in the Ohio state courts below, this petition should be dismissed. In addition, because the due process and separation of powers questions are clearly meritless, even if the petition is not dismissed, it should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this brief in opposition of Respondent State of Ohio were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class, postage prepaid, this _____ day of _____, 1983, to C. William Brownfield, Brownfield, Bowen & Bally, 140 East Town Street, Columbus, Ohio 43215.

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